Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Aleksandar Aleksandrov,

complainant,

and

G. Zavitz Ltd.,

respondent.

Board File: 28677-C
Neutral Citation: 2011 CIRB 602
August 8, 2011

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code* (*Part II Occupational Health and Safety*) (*Code*).

Parties

Mr. Aleksandar Aleksandrov, self-represented complainant;

Mr. Rick Brown, for G. Zavitz Ltd.

I–Nature of the Complaint

[1] Section 16.1 of the *Canada Labour Code* (*Part I–Industrial Relations*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

[2] On March 24, 2011, the Board received a complaint from Mr. Aleksandar Aleksandrov (Mr. Aleksandrov) alleging that his employer, G. Zavitz Ltd. (Zavitz) had terminated his employment as a result of his work refusal under Part II of the *Code*.

[3] A Health and Safety Officer (HSO) who investigated that work refusal determined that the situation about which Mr. Aleksandrov had complained did not constitute a danger under the *Code*. The HSO also issued directions to Zavitz for contraventions of two separate provisions of section 128 of the *Code* dealing with the work refusal process.

[4] Zavitz took the position that it had imposed no discipline, but rather Mr. Aleksandrov had quit his employment.

[5] For the reasons which follow, Zavitz has not persuaded the Board that it did not take actions which obliged Mr. Aleksandrov to leave his employment, as a result of the latter's raising of safety concerns under Part II of the *Code*.

II–Facts

[6] Zavitz originally hired Mr. Aleksandrov on or about February 2, 2010, as a truck driver. On December 14, 2010, Mr. Aleksandrov refused to take a load that had been assigned to him. Mr. Aleksandrov described the incident:

> On December 14, 2011 I was suspended from work. The reason for it was that I refused to switch my dedicated truck with a spare truck as my dispatcher asked me to do. In fact, switching trucks is a routine in this company. Unfortunately, the spare trucks are very dirty and the thought that I have to sleep in that kind of truck makes me sick. I received a copy of my suspension notice from which was clear that next time I refuse to switch trucks I'll be fired.

[7] Zavitz's "Notice of Disciplinary Action - 1 day suspension" dated December 15, 2010 set out its view of the situation:

> On December 14, 2010 you refused to take a load as you were not satisfied with your truck assignment for that day. It is not acceptable to refuse a dispatch for this reason, unless there is a valid safety concern. In this case you were offered suitable equipment to complete the assigned run, so it is for that reason we are issuing this 1 day suspension, for December 15, 2010.
>
> ...
>
> Alex, we appreciate the work that you do, and if we can work on these things I think that there will not be any future incidents. However, according to our company's progressive disciplinary procedures I must inform you that future incidents will lead to increased discipline.

[8] On January 24, 2011, Mr. Aleksandrov went to a doctor and obtained a prescription for a skin rash he had developed. Mr. Aleksandrov believed that the skin rash came from his truck mattress. He asked Zavitz's dispatcher whether he could buy his own personal mattress and put it in his truck.

[9] On January 25, 2011, the dispatcher called Mr. Aleksandrov and asked him to switch trucks for his next assigned load. Mr. Aleksandrov indicated he could not switch trucks because of the skin rash he had mentioned the previous day. Mr. Aleksandrov met that day with Zavitz's Safety and Compliance Manager, Mr. Rick Brown (Mr. Brown) about the issue.

[10] Mr. Aleksandrov alleged that he showed Mr. Brown his rash and indicated that he believed it had resulted from his work. Mr. Aleksandrov alleged that Mr. Brown fired him as a result of his refusal to take the load which had been assigned to him.

[11] Mr. Brown disputed Mr. Aleksandrov's description of the facts as shown in his January 28, 2011 statement taken from the HSO's Investigation Report and Decision:

> I explained that to Aleks, letting him know that I would help take care of getting the new mattress into his unit if that was what he wished but for this trip he would have to take another unit and there should not be any health concern, as he had not been in any other trucks in six (6) weeks and the rash was only one (1) week old. With that Aleks again started telling me that he would not go and I would have to fire him. I responded to this by letting him know that I had work for him and had alternative trucks for him to use and if he decided to clean out his truck and not work I would see that as him quitting his job. After that Aleks chose to leave and go clean out his truck, I had Mike Royer go and oversee Aleks clean out his truck and collect the company items such as credit cards etcetera. With Aleks taking those actions we saw it as him quitting his position.
>
> [sic]

[12] On January 25, 2011 at approximately 3:30 p.m., Mr. Aleksandrov notified the Labour Program at Human Resources and Skills Development Canada (HRSDC) that he had refused to work under Part II of the *Code*.

[13] On January 27, 2011, two HSOs visited Zavitz to conduct an investigation into Mr. Aleksandrov's work refusal. That investigation later led to two conclusions. Firstly, the HSO concluded that a danger did not exist for the purposes of Part II of the *Code*. Secondly, the HSO found Zavitz in violation of two provisions in Part II and issued Directions as a result. The HSO's letter of February 3, 2011 described the reasons for issuing Directions to Zavitz:

> The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:
>
> No. / No : 1
>
> **128.(10)(a) - Canada Labour Code Part II, -**
>
> An employer shall, immediately on being informed of the continued refusal under subsection (9) of the Canada Labour Code, investigate the matter in the presence of the employee who reported it and of at least one member of the workplace committee who does not exercise management functions.
>
> The employer failed to conduct an investigation of the refusal to work by an employee in the manner prescribed. There was no member of the workplace health and safety committee present at the investigation.

No. / No. : 2

128.(13) - Canada Labour Code Part II, -

If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

The employer failed to notify the health and safety officer as prescribed, following the continued refusal to work by an employee.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions immediately.

Further you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

(emphasis added)

[14] The HSO gave Zavitz until February 17, 2011, to comply with the Directions and to provide a written response from the workplace health and safety committee.

[15] On February 11, 2011, the HSO sent a further letter to Zavitz and Mr. Aleksandrov setting out his conclusion that no danger had existed when Mr. Aleksandrov invoked his right to refuse unsafe work. A further more detailed report would follow. The relevant portion of the HSO's letter reads:

On January 27, and February 3, 2011, I visited the work place located at 5795 THOROLD STONE ROAD, Niagara Falls, Ontario, L2J 1A1 for the purpose of conducting an investigation following the refusal to work made be Aleksandar Aleksandrov. During that visit, I was accompanied by health and safety officer Amy Ferguson.

Please be advised that pursuant to subsection 129(4) of the *Canada Labour Code*, Part II, the undersigned health and safety officer considers that a danger does not exist.

Also, please be advised that, pursuant to subsection 129(7) of the *Canada Labour Code*, Part II, the aforementioned employee is not entitled under section 128 or section 129 to continue to refuse on this matter.

Finally, be also informed that, pursuant to subsection 129(7), the aforementioned employee, or a person designated by the employee, may appeal the said health and safety officer's decision in writing to an appeals officer within ten (10) days after receiving this notice.

A full report of the undersigned health and safety officer's decision will be provided to the employer and employee as soon as possible.

[16] On March 16, 2011, the HSO sent both Mr. Aleksandrov and Zavitz his "Investigation Report And Decision" (Decision). Section II subsection 5 of the Decision set out the HSO's factual findings:

5. Facts established by the health and safety officer:

- The above employer is subject to federal jurisdiction as they are involved in for-hire interprovincial transport services
- The employee was employed with the employer at the time of his refusal
- The refusal was related to health and safety; specifically a skin condition
- The employee showed the rash to the employer
- The employee stated that he believed the rash was caused in the work place
- The assignment of a dedicated truck is a pseudo-normal practice with the above employer
- Alternate trucks were provided to the employee when his dedicated truck was in for repairs
- The employer's investigation included asking the employee how long he had been experiencing the rash, and how long it had been since he had been driving any other trucks
- The employee purchased a new mattress as a result of his symptoms
- The employer suggested installing the new mattress after the assigned trip was completed
- The employer did not request medical documentation from the employee
- The employer did not reassign the employee to other work until the investigation with the committee could be completed
- The employer failed to notify an employee member of the Work Place Health and Safety Committee
- The employer failed to notify HRSDC - Labour Program of the refusal to work
- The employer as of March 11, 2011 provided no written clarification or rational to the employee explaining the reasons for his termination even though it had been requested by the employee
- A Record of Employment was prepared and dated January 27, 2011 stating reason: "Quit"
- The vehicles inspected by the Health and Safety Officers on February 3, 2011 on February 3, 2011, trucks t-104 & t-143, appeared to be neat and tidy, however an odour of tobacco smoke was detected
- The employee had previously been disciplined and received a 1-day suspension for refusing to take a load; this situation also involved the employee refusing to operate an alternate truck
- There were allegations of safety concerns made by the worker in the case of that refusal

[sic]

(emphasis in original)

[17] The HSO concluded at section III of his Decision there was no evidence the trucks were the cause of Mr. Aleksandrov's rash:

> The officer concluded that a danger does not exist as the employee had been operating the same truck for several weeks prior to experiencing the skin irritation. Moreover, the cabs of the inspected trucks (T-104 & T-143) appeared to be clean and although the scent of tobacco cigarettes was present, no evidence existed to support the claim that the truck cabs were the cause of the rash or that switching truck cabs would have exacerbated the employee's condition.

III–Occupational Health and Safety under Part II of the *Code*

[18] Part II of the *Code* sets up, *inter alia*, a regime which protects employees from reprisals for raising safety concerns.

[19] The Federal Court of Appeal, in *Saumier* v. *Canada*, 2009 FCA 51, summarized how Part II prohibits an employer from disciplining an employee who legitimately exercises rights found in the *Code*:

> [43] A close reading of these legislative provisions leads to the following conclusions:
>
> (i) subsection 128(1) provides that an employee is entitled, inter alia, to refuse to work in a place or to perform certain activities "if the employee while at work has reasonable cause to believe" that there is danger for the employee in working in his or her workplace or that the employee's performance of his or her activities constitutes a danger to the employee;
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> (ii) the exception to that principle is found at subsection 128(2), which provides that an employee cannot invoke section 128 to refuse to work in a place or to perform certain activities if "the danger referred to in subsection (1) is a normal condition of employment";
>
> (iii) under section 147, an employer shall not take any disciplinary action against or threaten to take any such action against an employee who is legitimately exercising his or her rights pursuant to Part II of the *Code*, entitled "Occupational Health and Safety", which includes section 128;
>
> (iv) if the employer has acted in contravention of section 147, an employee may file a written complaint "of the alleged contravention" with the Board;
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> (v) however, after all investigations and appeals provided at sections 128 and 129 have been exhausted, section 147.1 allows an employer to take disciplinary action against an employee who has "wilfully" abused those rights.

[44] That is the legislative context of the complaint lodged by the applicant, who alleges that following the exercise of her rights under section 128, the RCMP issued her a return-to-work order, an order that it reiterated on more than one occasion, threatening her with disciplinary action if she continued her refusal.

[20] Section 128 of the Code establishes, *inter alia*, an employee's right to refuse unsafe work and the mandatory investigation of such refusals:

> 128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
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> (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
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> (b) a condition exists in the place that constitutes a danger to the employee; or
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> (c) the performance of the activity constitutes a danger to the employee or to another employee.
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> **No refusal permitted in certain dangerous circumstances**
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> (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
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> (a) the refusal puts the life, health or safety of another person directly in danger; or
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> (b) the danger referred to in subsection (1) is a normal condition of employment.
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> **Employees on ships and aircraft**
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> (3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that
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> (a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee,
>
> (b) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, or
>
> (c) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee,
>
> the employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.
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> **No refusal permitted in certain cases**
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> (4) An employee who, under subsection (3), is informed that the employee may not discontinue the use or operation of a machine or thing or cease to work in a place or perform an activity shall not, while the ship or aircraft on which the employee is employed is in operation, refuse under this section to use or operate the machine or thing, work in that place or perform that activity.

When ship or aircraft in operation

(5) For the purposes of subsections (3) and (4),

(a) a ship is in operation from the time it casts off from a wharf in a Canadian or foreign port until it is next secured alongside a wharf in Canada; and

(b) an aircraft is in operation from the time it first moves under its own power for the purpose of taking off from a Canadian or foreign place of departure until it comes to rest at the end of its flight to its first destination in Canada.

Report to employer

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

Select a remedy

(7) Where an employee makes a report under subsection (6), the employee, if there is a collective agreement in place that provides for a redress mechanism in circumstances described in this section, shall inform the employer, in the prescribed manner and time if any is prescribed, whether the employee intends to exercise recourse under the agreement or this section. The selection of recourse is irrevocable unless the employer and employee agree otherwise.

Employer to take immediate action

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

Continued refusal

(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

Investigation of report

(10) An employer shall, immediately after being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of

(a) at least one member of the work place committee who does not exercise managerial functions;

(b) the health and safety representative; or

(c) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the employee.

If more than one report

(11) If more than one employee has made a report of a similar nature under subsection (9), those employees may designate one employee from among themselves to be present at the investigation.

Absence of employee

(12) An employer may proceed with an investigation in the absence of the employee who reported the matter if that employee or a person designated under subsection (11) chooses not to be present.

Continued refusal to work

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

Notification of steps to eliminate danger

(14) An employer shall inform the work place committee or the health and safety representative of any steps taken by the employer under subsection (13).

(emphasis added)

[21] Section 129 mandates, *inter alia*, an HSO to investigate a work refusal and allows an employer, during that investigative process, to assign alternative work to the employee (section 129(5)):

129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is

(a) an employee member of the work place committee;

(b) the health and safety representative; or

(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

Employees' representative if more than one employee

(2) If the investigation involves more than one employee, those employees may designate one employee from among themselves to be present at the investigation.

Absence of any person

(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.

Decision of health and safety officer

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

Continuation of work

(5) Before the investigation and decision of a health and safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work, and shall not assign any other employee to use or operate the machine or thing, work in that place or perform the activity referred to in subsection (1) unless

(a) the other employee is qualified for the work;

(b) the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and

(c) the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

Decision of health and safety officer re danger

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

Appeal

(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

(emphasis added)

[22] Section 133 sets out the conditions which govern an employee's right to file a complaint alleging a reprisal occurred for exercising rights under Part II. For situations involving the right to refuse, the *Code* at section 133(6) reverses the burden of proof:

133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

Time for making complaint

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

Restriction

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

Exclusion of arbitration

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

Duty and power of Board

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

Burden of proof

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

(emphasis added)

[23] Section 147, to which section 133(1) refers, establishes the prohibition against employer disciplinary action in certain circumstances:

> 147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
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> (a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
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> (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
>
> (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

IV–Issues

[24] The Board needs to answer two questions in order to decide Mr. Aleksandrov's complaint:

1) Did Mr. Aleksandrov have reasonable cause to refuse to work on January 25, 2011?; and

2) Did Zavitz meet its reverse onus under section 133(6) of the *Code* to demonstrate that it did not violate the *Code*?

V–Analysis and Decision

1–Did Mr. Aleksandrov have reasonable cause to refuse to work on January 25, 2011?

[25] In order for Mr. Aleksandrov to pursue his complaint, section 128(1) of the *Code* requires the Board to be satisfied that he had "reasonable cause to believe" that a danger existed. In *George Court*, 2010 CIRB 498 (*Court 498*), the Board reviewed past case law regarding the need for an employee to have "reasonable cause" in order for a Part II safety complaint to proceed. The Board described this "threshold" at paragraphs 104–107 of *Court 498*:

> [104] The Federal Court of Appeal has recently confirmed in *Saumier v. Canada (Attorney-General)*, 2009 FCA 51 that if an employee does not have reasonable cause to believe that a request to return to work will pose a risk to his or her safety and health, then the safety complaint will be dismissed.
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> [105] JGH argued that Mr. Court had no "reasonable cause to believe" that a danger existed. Rather, he was attempting to invoke his right for other purposes, including his belief that the collective agreement entitled him to a tractor with air conditioning.
>
> [106] JGH put in evidence not only about Mr. Court's alleged falsification of the key documents, but also various witness' opinions that no danger existed on the morning of July 11, 2008. This evidence came from same-day examinations of tractor 1316 by JGH employees, opinions on the safety of conducting a pre-trip investigation and the report of the Joint Health and Safety Committee on October 30, 2008. That report came out two days after JGH had terminated Mr. Court's employment.
>
> [107] The threshold for finding a "reasonable cause to believe" is necessarily low. The issue is distinct from the question of whether danger actually existed. The Board has applied its reasonable cause test for exceptional situations. In the vast majority of cases, the Board has found that an employee had reasonable cause, even if the evidence later shows the employee was mistaken in his or her belief about danger existing.

[26] The Board is satisfied that Mr. Aleksandrov had reasonable cause to believe danger existed. The Board does not examine whether Mr. Aleksandrov was correct in his belief. Indeed, the HSO's later investigation concluded that danger as defined in the *Code* did not exist.

[27] However, the facts demonstrate that Mr. Aleksandrov had concerns that the skin rash which had forced him to see a doctor, and for which he received a medical prescription, resulted from a situation in his workplace. Moreover, Mr. Aleksandrov had asked for permission the day before to install in his truck his own mattress for those occasions when he slept in the truck when carrying out his assignments.

[28] As noted in the HSO decision at section II subsection 5, Zavitz "suggested installing the new mattress after the assigned trip was completed" (emphasis in original).

[29] Zavitz contested before the HSO, as it was entitled, whether any danger existed, but did not suggest that Mr. Aleksandrov's refusal was in any way a pretext designed to deal with some other work situation, such as an ongoing employment dispute.

[30] Mr. Aleksandrov has met his obligation to have reasonable cause to believe there was a danger to him in the workplace. The *Code* foresees that such situations will then be properly investigated, including, if necessary, having an independent HSO review the situation.

2–Did Zavitz meet its reverse onus under section 133(6) of the *Code* to demonstrate that it did not violate the *Code*?

[31] If an employee has properly exercised his or her rights under sections 128 or 129 to refuse to work, then section 133(6) of the *Code* does two things. First of all, the section deems that the complaint itself is evidence that the "contravention actually occurred". Secondly, the section imposes on the respondent the burden of proving otherwise.

[32] In the circumstances of this case, Zavitz has not convinced the Board that a contravention did not occur.

[33] Zavitz, at paragraphs 15-19 of its April 27, 2011 response, explained its position:

> 15. Aleksandar Aleksandrov quit his position and was not fired
>
> 16. Section 128(5) of the Canadian Labour Code allots the employer the right to assign alternative suitable work during an investigation. We were merely trying to exercise that right.
>
> 17. Given that Aleks is a professional driver it was appropriate to assign him work as a driver while we investigated any of his complaints.
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> 18. Had Aleks followed proper protocol and offered more assistance in the investigation, rather than walking away from his position, a unit acceptable to him would have been assigned for the trip in question while the modifications he requested were made to his regularly assigned unit.
>
> 19. Aleks himself states in his statement that he was aware that G. Zavitz Ltd., as do most trucking companies assign, alternative units while repairs are made to assigned units.
>
> [sic]

[34] The Board assumes that Zavitz' reference to "Section 128(5)" is in fact to section 129(5), *supra*, which deals with the assignment of alternative work during the work refusal process.

[35] There is no suggestion that Zavitz acted maliciously when dealing with Mr. Aleksandrov's issue on January 25, 2011. Nonetheless, Zavitz either did not understand the nature of Mr. Aleksandrov's refusal or simply decided Mr. Aleksandrov was wrong to refuse work. Despite Part II's requirement to call in an HSO (section 128(13)) when an employee and an employer disagree if danger exists, Zavitz instead sought to oblige Mr. Aleksandrov to drive an alternate vehicle.

[36] Zavitz's position, coupled with its December 15, 2010, warning letter that another refusal of a dispatch could result in increased discipline, left Mr. Aleksandrov with two options: he could either drive an alternate vehicle, despite his concerns that the vehicles themselves were the cause of his skin condition, or suffer further discipline.

[37] In the face of what was essentially an ultimatum, the Board does not accept Zavitz's position that Mr. Aleksandrov voluntarily quit his employment. Had Zavitz followed Part II of the *Code*, the matter would have been investigated properly.

[38] Zavitz at paragraph 16 of its response referred to its right to assign alternative work to Mr. Aleksandrov. In the specific circumstances of this case, that does not provide an adequate defence. Firstly, the alternative work cannot be this very type of work that the employee alleges constitutes a danger to himself or herself. Mr. Aleksandrov alleged that the condition of the cabs caused his medical situation. The situation might well have been different if a mechanical situation specific to one vehicle had been in issue, rather than a general concern like the one Mr. Aleksandrov raised.

[39] Secondly, and in any event, section 129(5) allows an employer to assign reasonable alternative work, but only after it has already respected its obligation to call in an HSO under section 128(13). Zavitz never contacted an HSO.

[40] Zavitz disputed Mr. Aleksandrov's assessment that a danger existed when he refused to work. The *Code* sets out a clear procedure for an employer to follow in order to investigate these legitimate differences of opinion. However, instead of continuing the process contemplated by sections 128 and 129, Zavitz instead insisted that Mr. Aleksandrov carry out his dispatched work, albeit in a different vehicle, despite the latter's continuing position that he considered that particular work unsafe.

[41] In the Board's view, these factors prevent Zavitz from meeting the burden the *Code* imposed upon it at section 133(6).

[42] The Board is satisfied that Mr. Aleksandrov lost his job with Zavitz for reasons related to his refusal to do work which he believed constituted a danger. Mr. Aleksandrov only left his employment when Zavitz insisted he perform the same work that had already resulted in a work refusal, and which was not properly investigated under the *Code*.

VI–Remedy

[43] The Board will issue a declaration that Zavitz violated the *Code*.

[44] The Board reserves its jurisdiction to issue further remedial relief under section 134 of the *Code*, but will first have its Industrial Relations Officer meet with the parties in order to mediate these issues, if possible.

[45] If no resolution occurs, the Board will establish a timetable for further written submissions on the issue.

Graham J. Clarke
Vice-Chairperson